under the circumstances is adopted. *Gibbons* v. *Anderson*, 80 Fed. Rep. 345; *Hun* v. *Cary*, 82 N. Y. 65. This is the broad rule, so often applied in other connections, and is much preferable both theoretically and practically, avoiding as it does the rather discredited doctrine of degrees of negligence. Obviously also the care which ought to be bestowed must vary with the nature of the business, and the time and place of its exercise. The care of a prudent man in his own business and the care ordinarily exercised by directors would seem to be valuable rather as evidence of what is reasonable care than as direct standards of care. Probably many of the differences in the cases are due rather to the application of the law to the facts than to any marked conflict in the conception of the law; differences as to what constitutes reasonable diligence. *Cf. Briggs* v. *Spaulding*, 141 U. S. 132; *Percy* v. *Millaudon*, 8 Mart. N. S. (La.) 68. The principal case in the main adopts the preferable rule stated above. Moreover, its application of the law to the facts, though the result is extremely hard on the directors, seems justified.

THE SPECIFIC ENFORCEMENT OF CONTRACTS BY INJUNCTION. — The latest decision of the English Chancery Division gives promise for the future of an intelligible treatment of the much confused subject of specific enforcement of affirmative covenants by process of injunction. *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799. A bill was brought by an electric light company against a hotel proprietor who had agreed to take from the plaintiff all the electricity he might require for five years. The prayer was for an injunction restraining the defendant from purchasing electric energy from any one other than the plaintiff during that period. In granting the injunction the court reviews the earlier decisions, and cites with approval and as embodying the now settled rule of the court the opinion of Lord Selborne in *Wolverhampton, etc., R. R.* v. *London, etc., R. R.*, L. R. 16 Eq. 433.

If the opinion of Lord Selborne in the case mentioned represents the present view of the English court upon this subject it may be of interest to note the general outlines and to consider the effect upon the earlier cases of *Lumley* v. *Wagner*, 1 DeG., M. & G. 604; *Fothergill* v. *Rowland*, L. R. 17 Eq. 132; *Donnell* v. *Bennett*, 22 Ch. Div. 835, and *Whitwood Co.* v. *Hardman*, [1891] 2 Ch. 416. The general principles laid down by Lord Selborne appear to be as follows. The court will first construe the contract of which specific performance is sought. The substance of the agreement as well as the language used will be regarded, and weight will not be given to the accidental use of affirmative rather than negative forms of expression. The question will then arise whether the act sought to be enjoined is a breach of the substance of the agreement, and if so, whether adequate damages can be had in an action at law. It must further appear that the contract is of a kind that equity can and will specifically enforce. Under this consideration will be raised questions of public policy, expediency, mutuality and others resting largely in the discretion of the court. If these issues all result in favor of the party seeking relief, equity will grant relief by injunction or affirmative decree, regardless of the affirmative or negative form of the original agreement.

Tested by these principles *Fothergill* v. *Rowland* and *Whitwood Co.* v. *Hardman, supra*, are supported, the former upon the ground of the ade-

quacy of the remedy at law, and the latter upon the ground that equity will not specifically enforce contracts for personal services. *Lumley* v. *Wagner* and *Donnell* v. *Bennett*, *supra*, however, seem inconsistent with the principles above stated. The cases, to be sure, have been distinguished upon the ground of the existence of an express covenant not to do the act enjoined. In both cases, however, that covenant was one that upon the construction of the contract would have been implied had it not been expressed, an illustration, therefore, of that accidental employment of negative rather than affirmative forms of expression to which, according to Lord Selborne, weight should not be given. Moreover, in neither of these cases did the question of the adequacy of the legal remedy play the important part assigned to it in the opinion endorsed by the principal case.

While the doctrine of *Lumley* v. *Wagner* cannot as yet, be said to be established in this country, it has been followed or favorably commented upon by a number of important courts. The American decisions, however, differ from the English in two respects. They have refused to limit the doctrine to cases showing an express covenant not to do the act enjoined, where upon construction of the contract an implied agreement to the same effect would be raised. *Duff* v. *Russell*, 60 N. Y. Super. Ct. Rep. 80; affirmed 133 N. Y. 678. They have refused to apply the doctrine to cases where the services contracted for could be rendered by a substitute, that is, to cases where there was an adequate remedy at law. *Carter* v. *Ferguson*, 58 Hun (N. Y.) 569. While the case of *Lumley* v. *Wagner* has been subjected to some criticism it must be admitted that if the doctrine be accepted the American treatment accords better with general principles of equity than its treatment at the hands of the courts from which it emanated.

CONTRACTS REQUIRING THE ARCHITECT'S APPROVAL AS A PREREQUISITE TO PAYMENT. — American courts have in general shown greater leniency than the English in regard to the performance of express conditions precedent. In no class of cases is this fact better brought out than in suits on building contracts in which payment is to be made only when the architect's certificate is obtained. In England the builder must produce the certificate; he can only excuse himself by proving collusion between the architect and the defendant. *Batterbury* v. *Vyse*, 2 H. & C. 42; *Clarke* v. *Watson*, 18 C. B. N. S. 278. In most of our states fraud or gross mistake in withholding the order will entitle the plaintiff to sue on the contract without it. *St. Paul, etc., Ry.* v. *Bradbury*, 42 Minn. 222. *Classen* v. *Davidson*, 59 Ill. App. 106. But in New York, if the plaintiff can persuade the jury that he has substantially performed the contract he can recover in spite of the architect's disapproval. *Nolan* v. *Whitney*, 88 N. Y. 648. A recent decision in a circuit court of Ohio adopts the New York view. The plaintiff sued on a building contract containing the usual condition of payment upon presentation of the architect's certificate. He did not produce the certificate, and could not prove fraud. The jury found specially that the architect's reason for refusing the certificate was dissatisfaction with the work. The court, on appeal, sustained a general verdict in favor of the plaintiff on the ground that it was not found that the architect's refusal was reasonable. *Wicker* v. *Messinger*, 12 Oh. Circ. Dec. 425.